106th Congress
1st Session

SENATE

Report
106–14

PROVIDING GUIDANCE FOR THE DESIGNATION OF EMERGENCIES AS A PART OF THE BUDGET PROCESS

R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

together with

ADDITIONAL VIEWS

TO ACCOMPANY

S. 557

PROVIDING GUIDANCE FOR THE DESIGNATION OF EMERGENCIES AS A PART OF THE BUDGET PROCESS

March 15, 1999.—Ordered to be printed

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MARCH 15, 1999.—Ordered to be printed

Mr. THOMPSON, from the Committee on Governmental Affairs, submitted the following

REPORT

[To accompany S. 557]

I. PURPOSE OF THE BILL

The purpose of the bill is to curb the abuse of designating provisions of legislation as an "emergency" in order to circumvent budget laws.

II. SUMMARY OF S. 557

The bill amends the Congressional Budget Act of 1974 to add a new section 318 regarding emergency legislation. The bill adds a reporting requirement for the President and Congress to justify proposed emergency spending and to document whether proposed emergencies meet five criteria: necessary, sudden, urgent, unforeseen, and not permanent. If a proposed emergency does not meet these criteria, then the President and the Congress must justify why the provision constitutes an emergency. In addition to this reporting requirement, the bill provides a point of order in the Senate against any provision in legislation that is designated as an emergency. If the point of order is raised and sustained against a provision designated as an emergency, that provision would be stricken from the legislation. The point of order can be waived in the Senate by the affirmative vote of a simple majority.

III. BACKGROUND AND NEED FOR LEGISLATION

The Budget Enforcement Act (BEA) of 1990 amended the Balanced Budget and Emergency Deficit Control Act of 1985 to require that the cost of appropriations legislation be within spending limitations and that the cost of all other legislation satisfy a "pay-as-you-go" requirement. If the cost of legislation does not meet these two requirements, a sequester order will be issued (an across-the-board spending reduction) in order to ensure such legislation does not cause an increase in the deficit.

There was a concern this enforcement regimen could stifle efforts to provide funding for extraordinary emergencies. As a result, Congress provided in sections 251(b)(2)(A) and 252(e) of the Balanced Budget and Emergency Deficit Control Act that provisions of legislation designated as an emergency requirement are exempt from the limits on appropriated spending and the pay-as-you-go requirement. More specifically, if the President designates a provision as an emergency requirement and the Congress concurs in statute, then the cost of that provision of legislation is effectively exempted from the spending limits and the pay-as-you-go requirement.

The BEA is generally silent as to what constitutes an emergency—with two exceptions. When the BEA was enacted, it specifically defined and exempted the incremental costs associated with the 1990–1991 Persian Gulf War (Operations Desert Shield and Desert Storm). Second, in 1994, as part of legislation dealing with crop insurance, Congress amended the BEA to provide that agriculture crop disaster spending could not be designated as an emergency requirement.

The question of the definition of emergency spending immediately became an issue after the BEA's enactment in 1990. As part of the FY 1992 Dire Emergency Supplemental Appropriations Act (Public Law 102–55), Congress directed the Office of Management and Budget (OMB) to prepare a report on emergencies. On June 27, 1991, OMB submitted a report to Congress on the cost of domestic and international emergencies.[1] in that report, OMB used the following five elements to define what constituted an emergency:

necessary expenditure—an essential or vital expenditure, not one that is merely useful or beneficial;

sudden—quickly coming into being, not building up over time;

urgent—pressing and compelling need requiring immediate action;

unforseen—not predictable or seen beforehand as a coming need (an emergency that is part of an aggregate level of anticipated emergencies, particularly when normally estimated in advance, would not be "unforeseen"); and

not permanent—the need is temporary in nature.

Although the BEA was amended in 1993 and again in 1997 to extend the limits on appropriated spending and the pay-as-you-go requirement, the provisions regarding emergency spending were not substantively changed. While major changes have not been made to the law, there has been a growing concern about the cost of emergencies. For example, the FY 1995 Emergency Supplemental Appropriations Act created a Senate task force to study dis-

[1] Office of Management and Budget, Executive Office of the President, Report on the Costs of Domestic and International Emergencies and on the Threats Posed by the Kuwaiti Oil Fires (as required by P.L. 102–55, June 1991.

aster assistance funding. That task force reported to the Senate on March 15, 1995.

The Omnibus Consolidated and Emergency Supplemental Appropriations Act for fiscal year 1999, including $21.4 billion in emergency spending, and represented an unprecedented use of the exemption for emergency spending. As the table below illustrates, Congress has consistently provided for emergency spending since 1990. Nonetheless, the combination of the amount of money provided and the broad use of the emergency designation in last year's omnibus appropriations measure was unprecedented.

TABLE 1. OVERVIEW OF EMERGENCY SPENDING, 1991–1999

	Fiscal year—								
	1991	1992	1993	1994	1995	1996	1997	1998	1999
EMERGENCY SPENDING AMOUNTS (Millions of dollars budget authority)[1]									
Total	45,846	16,168	6,029	13,860	7,935	5,051	9,536	5,898	21,574
By Type of Spending:									
Defense	44,387	7,527	642	1,497	2,448	982	2,077	2,834	7,796
Nondefense	1,459	8,641	5,387	12,363	5,487	4,069	7,459	3,064	13,778
By Type of Appropriation:									
Regular	1,000	314	878	1,901	1,704	487	2,122	313	21,444
Supplemental[2]	44,846	15,854	5,151	11,959	6,231	4,564	7,414	5,585	130
By Type of Designation:									
Designated	45,846	15,708	5,336	12,942	7,717	5,047	9,236	5,699	13,987
Contingent[3]	0	460	693	918	218	4	300	199	7,587
NUMBER OF APPROPRIATION ACCOUNTS THAT CONTAIN EMERGENCY FUNDING									
Total	43	93	59	62	48	61	110	60	104
By Type of Spending:									
Defense	37	14	4	10	13	11	15	25	35
Nondefense	6	79	55	52	35	50	95	35	69
By Type of Appropriation:									
Regular	1	2	5	11	9	7	72	3	103
Supplemental	42	91	54	51	39	54	39	57	1
By Type of Designation:									
Designated	43	85	55	55	45	60	107	56	85
Contingent[3]	0	8	4	7	3	1	3	4	19

[1] The budget authority amounts for 1991 through 1998 differ from those in CBO's June 23, 1998, testimony on emergency spending because they reflect updates in the categorization and designation of several contingencies.
[2] The supplemental amount of 130 million for 1999 represents a 1998 contingent emergency supplemental appropriation designated as an emergency by the President (and thus made available for obligation) on November 5, 1998.
[3] Appropriation items awaiting emergency designation by the President.

Source: Congressional Budget Office.

IV. LEGISLATIVE HISTORY

1999 (106th Congress)—S. 557 was ordered reported as an original bill from the Committee on Governmental Affairs on March 4, 1999 and filed with the Senate on March 8, 1999. The bill provides a majority vote point-of-order against emergency spending legislation.

On January 6, 1999, Senator Lott on behalf of Senator Domenici introduced S. Res. 5, a resolution to amend the Senate's procedures for consideration of emergency legislation. On January 19, 1999, Senator Domenici introduced S. 93, the Budget Enforcement Act of 1999. Title II of S. 93 would have amended the Congressional Budget Act of 1974 to modify procedures for the consideration of emergency legislation. S. Res. 5 and title II of S. 93 would have established 5 guidelines (necessary, sudden, urgent, unforeseen, and temporary) for evaluating emergency proposals and made any emergency provision subject to 60 vote point of order in the Senate. S. Res. 5 and title II of S. 93 also provided a 60 vote point of order against riders on emergency supplemental appropriations bills. Both S. Res. 5 and S. 93 were jointly referred to the Committees on Budget and Governmental Affairs.

i. Hearings

January 27, 1999—Joint Budget and Governmental Affairs Committee Hearing: Governmental Affairs Committee Chairman Thompson and Budget Committee Chairman Domenici chaired a joint hearing on S. 92, the Biennial Budgeting and Appropriations Act, and S. 93, the Budget Enforcement Act of 1999. Title II of S. 93 contained proposed emergency spending reforms.

There were three panels of witnesses:

Panel I—The Honorable John McCain, United States Senator from Arizona. Senator McCain criticized the current treatment of emergency spending.

Panel II—The Honorable Benjamin L. Cardin, A Representative from Maryland and the Honorable Jim Nussle, a Representative from Iowa. Both witnesses advocated changes to the current treatment of emergency spending.

Panel III—Timothy J. Muris, Professor, George Mason University School of Law; Van Doorn Ooms, Senior Vice President and Director of Research, Committee for Economic Research; and Martha Phillips, Executive Director, the Concord Coalition.

Mr. Muris testified in favor of reforming the current treatment of emergency spending. In addition, Ms. Phillips testified in favor of the proposed emergency spending reform legislation.

ii. Committee action

On March 4, 1999, the Committee held a business meeting at which an original committee bill embodying the text of title II of S. 93, providing guidance for the designation of emergencies as a part of the budget process, was considered. Senator Domenici offered an amendment in the nature of a substitute, on his behalf and cosponsored by Senator Lieberman and Senator Thompson, which was approved by voice vote. This substitute amendment reduced the votes necessary to waive the point-of-order from a 60-vote requirement to a majority requirement. Further, the amendment dropped the point-of-order against riders on emergency supplemental appropriation bills.

An amendment exempting national defense spending form the majority point-of-order was offered, by Senator Stevens. Following discussion of the amendment, Senator Stevens withdrew his amendment.

Following completion of debate on the measure, the Committee favorably ordered the committee print, as amended, to be reported by voice vote.

V. Section-by-Section Analysis

Section 1(1) of the bill adds a new section 318 to the Budget Act to address emergency legislation. Pursuant to sections 251(b)(2)(A) and 252(e) of the Balanced Budget and Emergency Deficit Control

Act, legislation can be exempted from the limits on discretionary spending and the pay-as-you-go requirement for direct spending and revenue legislation if the President and the Congress designate the spending or revenue change as an emergency requirement.

The proposed new section (section 318) retains the existing exemption for emergency legislation, but makes a number of changes to tighten up the ability for new spending or revenue losses to be exempt from the spending limitations and the pay-as-go-requirement.

Section 318(a) essentially provides a new reporting requirement, directing the President and congressional committees to analyze whether a proposed emergency meets five criteria that the Office of Management and Budget first outlined in a 1991 report to the Congress. That report defined an emergency as a requirement that was necessary, sudden, urgent, unforeseen, and not permanent. These criteria are listed in paragraph (2) of section 318(a). If a proposed emergency does not meet these criteria, subparagraph (3) requires the President or the reporting committee to justify why the proposal constitutes an emergency.

Section 318(b)(1) establishes a new point of order in the Senate that can be waived by a simple-majority vote (usually 51 votes). This point of order is similar to the point of order under section 313 of the Budget Act, known as the "Byrd rule". This point of order would lie against a specific provision of a bill and does not lie against the entire bill. If the point of order is sustained in the Senate, the provision is stricken from the bill.

As is the case with other points of order under the Budget Act, this point of order is not self-executing. A Senator must challenge a provision and raise a point of order on the floor of the Senate. The reporting and justification requirements set forth in section 318(a) do not determine the application of this point of order. Any provision designated as an emergency is subject to this point of order. Based on the reporting requirements of section 318(a) and the debate on the motion to waive, the Senate will ultimately decide whether an emergency provision should be exempted from the spending limitations or the pay-as-you-go requirement.

Section 318(b)(2) provides that a Senator may make a single omnibus point of order against a number of provisions in the same manner as is currently permitted by the Byrd Rule (see section 313(e) of the Budget Act).

Section 318(b)(3) provides that if a point of order is sustained against a conference report the conference report will be disposed of in the same manner as is currently permitted by the Byrd rule (see section 313(d) of the Budget Act).

Section 1(2) of the bill amendments the table of Contents in section 1(a) of the Budget Act by adding after section 117 the following:

"318. Emergency Legislation".

VI. Regulatory Impact Statement

The enactment of this legislation will not have significant regulatory impact. S. 557 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act

(UMRA) and would impose no costs on state, local, or tribal governments.

VII. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 12, 1999.

Hon. FRED THOMPSON,
Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 557, a bill to provide guidance for the designation of emergencies as a part of the budget process.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mary Maginniss.

Sincerely,

BARRY B. ANDERSON,
(For Dan L. Crippen, Director).

Enclosure.

S. 557—A bill to provide guidance for the designation of emergencies as a part of the budget process

Summary: This legislation would impose new controls on emergency spending and thus could result in savings to the federal government, but CBO has no basis for estimating the precise amount. Because S. 557 would not affect direct spending or receipts, pay-as-you-go procedures would not apply. The bill contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

Description of the bill's major provisions: Under the Balanced Budget and Emergency Deficit Control Act, the President and the Congress can designate certain spending or revenue changes as an emergency requirement, thereby exempting them from the limits on discretionary spending and the pay-as-you-go rules for legislation affecting direct spending and revenues. S. 557 would retain the existing exemption for emergency spending but would impose new restrictions. Specifically, the bill would direct the President and Congressional committees to analyze whether a proposal for emergency spending meets five criteria—that is, whether the proposed spending or tax change is (1) essential, (2) sudden, (3) urgent, (4) unanticipated, and (5) temporary. The bill also would establish points of order in the Senate that, if sustained, would (1) strike provisions designated as emergency requirements that fail to meet the five criteria for emergency spending, and (2) strike nonemergency provisions included in emergency supplemental appropriation bills.

Estimated cost to the Federal Government: Appropriations that are designated as emergency spending trigger increases in the caps on discretionary budget authority and outlays, thus allowing for greater spending than under the existing caps. Similarly, reductions in revenues or increases in outlays from direct spending that are designated as emergencies are not subject to pay-as-you-go procedures, also allowing for greater spending or lower revenues than could occur without such designations. Because S. 557 might make it more difficult for some provisions to qualify as emergency requirements, it could reduce the magnitude of emergency spending in the future and thus lead to larger surpluses or smaller deficits than would occur under current law.

Almost all emergency spending has been the result of appropriation action. Annual amounts of budget authority appropriated for emergency spending have ranged from $5 billion to almost $46 billion over the 1991–1999 period. However, CBO has no basis for predicting what emergency designations would be made in the future, either under current law or under this bill. Thus, we cannot estimate the savings, if any, that might result from enacting S. 557.

Pay-as-you-go considerations: None.

Intergovernmental and private-sector impact: The legislation contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no costs on state, local, or tribal governments.

Estimate prepared by: Mary Maginniss.

Estimate approved by: Robert A. Sunshine, Deputy Assistant Director for Budget Analysis.

VIII. Additional Views of Senator Pete V. Domenici

This bill is designed to curb the increasing abuse of designating legislation as an "emergency." The Budget Enforcement Act of 1990 established statutory limits on appropriated spending and a pay-as-you-go requirement for revenue legislation and direct spending legislation. That Act also provided an exemption from these spending limits and the pay-as-you-go requirement for legislation that was designated as an emergency. Designating provisions of legislation as an emergency allows the President and the Congress to skirt the limits on appropriated spending and the pay-as-you-go requirement for direct spending and revenue legislation.

This emergency exemption for legislation has become a loophole to tap the budget surplus for all kinds of spending. In his 1998 state of the union address, the President pledged that every penny of any surplus should be saved until Social Security is reformed. While the subsequent debate has focused on tax reductions and the surplus, few realize that since the President's pledge we have already spent $27 billion of the surplus by designating legislation as an "emergency." The FY 1998 Emergency Supplemental Appropriations Act included $5.7 billion in emergency appropriations and the FY 1999 Omnibus Consolidated and Emergency Supplemental Appropriations Act provided $21.4 billion in emergency appropriations.

My original proposal, title II of S. 93, would have made any provision designated as an emergency subject to a 60 vote point of order in the Senate. When I was developing this proposal, some advocated that we should repeal the emergency exemption in its entirety. Others suggested that we should only exempt the first year's cost of legislation. I rejected these two approaches because I believe we need to have some way to quickly and fully respond to extraordinary emergencies without violating our budget laws.

Although I still believe my original proposal was a reasonable way to curb the misuse of the emergency designation, it did not have the support of a majority of the Governmental Affairs Committee. With the assistance of the Chairman, Senator Thompson, and the ranking member, Senator Lieberman, we were able to develop a proposal that would enjoy the support of the committee. I felt it was crucial to get this bill to the floor so that the debate regarding the budgetary treatment of emergencies would continue. I particularly appreciate Senator Lieberman's efforts to gain adoption of this proposal. This modified approach as reported by the committee may be sufficient to curb the abuse of emergency spending and I will study it further. As I made clear when we developed this compromise, however, I reserve the right to offer or support an amendment that would raise the threshold to 60 votes to waive a point of order against emergency spending.

Pete V. Domenici.

IX. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported are shown as follows:

The Congressional Budget Act of 1974 is amended (1) by adding the following new section at the end of title III:

SEC. 318. EMERGENCY LEGISLATION.

(a) DESIGNATIONS.—

(1) GUIDANCE.—In making a designation of a provision of legislation as an emergency requirement under section 251(b)(2)(A) or 252(e) of the Balanced Budget and Emergency Deficit Control Act of 1985—

(A) the President shall submit a message to the Congress analyzing whether a proposed emergency requirement meets all the criteria in paragraph (2); and

(B) the committee report, and any statement of managers if any, accompanying that legislation shall analyze whether a proposed emergency requirement meets all the criteria in paragraph (2).

(2) CRITERIA.—

(A) IN GENERAL.—The criteria to be considered in determing whether a proposed expenditure or tax change is an emergency requirement are whether it is—

(i) necessary, essential, or vital (not merely useful or beneficial);

(ii) sudden, quickly coming into being, and not building up over time;

(iii) an urgent, pressing, and compelling need requiring immediate action;

(iv) subject to subparagraph (B), unforeseen, unpredictable, and unanticipated; and

(v) not permanent, temporary in nature.

(B) UNFORESEEN.—An emergency that is part of an aggregate level of anticipated emergencies, particularly when normally estimated in advance, is not unforeseen.

(3) JUSTIFICATION FOR FAILURE TO MEET CRITERIA.—If the proposed emergency requirement does not meet all the criteria set forth in paragraph (2), the President, the committee report, or the statement of managers, as the case may be, shall provide a written justification of why the requirement should be accorded emergency status.

(b) POINT OF ORDER.—

(1) IN GENERAL.—When the Senate is considering a bill, resolution, amendment, motion, or conference report, upon a point of order being made by a Senator against any provision in that measure designated as an emergency requirement pursuant to section 251(b)(2)(A) or 252(e) of the Balanced Budget and Emer-

gency Deficit Control Act of 1985 and the Presiding Officer sustains that point of order, that provision along with the language making the designation shall be stricken from the measure and may not be offered as an amendment from the floor.

(2) GENERAL POINT OF ORDER.—A point of order under this subsection may be raised by a Senator as provided in section 313(e).

(3) CONFERENCE REPORTS.—If a point of order is sustained under this subsection against a conference report the report shall be disposed of as provided in section 313(d).; and

(2) in the table of contents in section 1(a), by adding after the item for section 317 the following:

318. Emergency legislation.

○